In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1482

AUTOHAUS BRUGGER, INC.,
Petitioner,

vs.

SAAB MOTORS, INC. and SAAB-SCANIA OF AMERICA, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

RAOUL D. KENNEDY
NED N. ISOKAWA
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
1939 Harrison Street
Oakland, California 94612

WILLIAM T. RINTALA
KAPLAN, LIVINGSTON, GOODWIN,
BERKOWITZ & SELVIN
450 North Roxbury Drive
Beverly Hills, California 90210

WILLIAM J. DOYLE
WIGGIN & DANA
195 Church Street
New Haven, Connecticut 06508
Attorneys for Respondents

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES

In the Supreme Court of the United States

October Term, 1977

No. 77-1482

Autohaus Brugger, Inc.,
Petitioner,

vs.

Saab Motors, Inc. and Saab-Scania of America, Inc.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (App. of Petition) is reported at 567 F.2d 901. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court's review of the entire record below reveals no substantial evidence that could support a reasonable jury's finding of a violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225.

2. Whether the District Court erred in permitting a surprise and previously undeposed witness to testify on crucial liability issues.

3. Whether the District Court erred in refusing to allow cross-examination of the only expert witness on the issue of damages where the expert's opinions were based upon unsubstantiated assumptions not in evidence.

4. Whether the District Court erred in leaving for the jury's determination a question of law involving interpretation of a contract.

STATEMENT

Petitioner Autohaus Brugger, Inc. (Autohaus), a franchised automobile dealer, complains that Respondents Saab Motors, Inc. and Saab-Scania of America, Inc. (Saab),* an automobile distributor, breached their franchise agreement and violated the Automobile Dealers' Day in Court Act (the Act), 15 U.S.C. §§ 1221-1225. The genesis of this litigation and the key to its disposition are Autohaus's warranty payment demands. Pursuant to the franchise agreement between Saab and Autohaus, Saab was required to reimburse Autohaus for parts used and work done by Autohaus on Saab cars during the warranty period. Ex 167 p. 4; 171 pp. 12-13. Autohaus asserts that its warranty

*Saab-Scania of America, Inc. is the successor in interest to Saab Motors, Inc., which was also named as a defendant in this action (CT 18:19-21).

Matters of form: The Reporter's Transcript will be cited "RT" followed by page, colon and line numbers. The Clerk's Transcript will be cited similarly. Exhibits will follow the District Court's designation.

claims were not honored by Saab. According to Autohaus, the warranty claims dispute escalated into a violation of the Act with Saab attempting to coerce Autohaus into abandoning the warranty claims and eventually terminating Autohaus when the claims were not forsaken.

Saab will not dwell on each and every fact surrounding the asserted warranty indebtedness except to point out that the Court below in its opinion (567 F.2d at 904-908) thoroughly discusses the paucity of evidence on this issue and concludes that Saab owes Autohaus nothing on the disputed warranty claims. This dearth of evidence exists despite the fact that the District Court, over Saab's repeated objections, allowed Autohaus's bookkeeper to testify even though she had not been identified as a prospective witness and had not yet been deposed by Saab. RT 1332:21-25; 1460:9-1462:1; 1472:10-1474:3; 1476:20-1510:8.

Coincident with the warranty claims dispute, Saab was making efforts to renew Autohaus as a dealer. Autohaus challenges this fact and contends that Saab was using various coercive and intimidating means to terminate Autohaus as a dealer. Petition, pp. 11-32. At this stage, Saab deems it pointless to indulge in another recitation of the lack of evidence necessary to support Autohaus's claims. Autohaus is raising before this Court the exact same arguments it advanced before and had rejected by the Court below. The only way Saab knows to conclusively refute Autohaus's contentions is to place before this Court its own lengthy rendition of the facts below. Saab eschews this chore because this Court's function is not to review evidence, especially in determining whether to grant certiorari.

At trial, Autohaus's expert witness on the issue of damages, an accountant, was allowed to testify, over repeated objections, that in his opinion Autohaus lost profits because

Saab failed to renew the franchise. RT 767:20-768:6; 770:5-10; 771:2-5; 775:22-776:3; 782:10-13; 783:20; 801:4-18. The accountant conceded that his opinion was based upon an assumption of projected car sales for which there was no evidence and that in computing the lost profits in this case, he used Autohaus's historical gross to net profit ratio for its entire business of selling four different model cars rather than just Saabs. RT 774:9-25; 784:1-786:9; 817:22-827:1. The District Court refused to permit Saab to cross-examine the accountant on the obvious foundational deficiencies infecting his opinion testimony. RT 816:10-817:16. The opinion below notes: "We would also reverse on the grounds that the evidence is wholly insufficient to support the award of $200,000 in damages. However, since we find no liability, we need not discuss this issue." 567 F.2d at 904, fn. 1.

At the conclusion of the evidence, the District Court left to the jury the interpretation of the franchise agreement. RT 1856:5-13. At issue was whether the agreement expired by its own terms on September 30, 1972, or whether it continued in effect past that date. The Court below found this to be error since "interpretation of a written contract is a question of law for the court to determine." 567 F.2d at 915, fn. 10.

Autohaus did not seek a rehearing before the Ninth Circuit division that rendered the opinion below. Had it done so, Autohaus could have properly pressed its plea for a second review of the evidence to a court which had already combed through the entire record below. Moreover, Autohaus did not request a rehearing before the Ninth Circuit en banc. Instead, Autohaus inappropriately fulfills the often articulated but happily seldom consummated threat—"I'll take this all the way to the United States Supreme Court."

ARGUMENT

Autohaus's 37 page Petition contains a lengthy, 26 page "Statement" section devoted to its version of the record below. In contrast, the "Reasons For Granting The Writ" section is only six pages long. The reason is clear: Autohaus is petitioning this Court for a second review of the evidence.

In an attempt to legitimize its entreaty to this Court, Autohaus poses a sham conflict of decision. Making reference to three other circuit court decisions involving the Act, Autohaus asserts that the "approach" followed by the Court below is somehow at variance with the other three decisions. However, the "approach" followed by each court is the same —the well established standard of appellate review of a jury verdict. This "approach" is so well settled that it is deserving of absolutely no consideration by this Court.

I. There Is No Conflict of Decision

Autohaus's assertion that the *"approach"* followed by the Court below "simply cannot be reconciled" with the *decisions* of three other circuit courts (Petition, p. 36) by its very words does not create a true conflict of decision worthy of review by this Court on certiorari. Since Autohaus cannot point to any real conflict of decision because this case and the others all turn on differing facts, it is reduced to claiming that the standards of appellate review utilized below conflict with those used by the other circuit courts. Even if credence is given to Autohaus's contention that the purported difference in "approach" equals a true conflict, close scrutiny reveals that even this conflict in approach is illusory.

Citing *American Motors Sales Corporation v. Semke,* 384 F.2d 192 (10th Cir. 1967) and *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corporation,* 447 F.2d 786 (5th Cir. 1971) as the allegedly conflicting decisions, Autohaus asserts

that the jury may infer from the entire course of dealing between it and Saab the existence of the coercion or intimidation necessary to impose liability under the Act and that the Court below erred in rejecting these inferences. Petition, pp. 33-34. First, the opinion of the Court below makes clear that the Court followed the rule that on review of a jury verdict, the prevailing party "is entitled to the benefit of all *reasonable* inferences that may be drawn from its evidence." 567 F.2d at 909. Second, the Court below "searched the entire 1,896 pages of the transcript" and discussed each of the seven areas where Autohaus claims there is evidence that Saab violated the Act. *Id.* at 907, 912-914. Last and most important, the Court below concluded after its exhaustive review of the entire course of dealing between Autohaus and Saab that "the evidence is wholly insufficient to support a reasonable jury's finding in favor of Autohaus on either the breach of contract claim or violation of the Dealers Day in Court Act" (*Id.* at 910.) and that the verdict "if allowed to stand would be a legally unjustified windfall to plaintiff and a miscarriage of justice." *Id.* at 915. What Autohaus fails—or refuses—to appreciate is that the absence of evidence rendered the jury incapable of drawing any inferences supporting the verdict against Saab.

In *American Motors Sales Corporation v. Semke,* 384 F.2d 192 (10th Cir. 1967), the Tenth Circuit affirmed a judgment in favor of a formerly franchised automobile dealer against an automobile manufacturer under the Act by resorting to the same standards of appellate review used by the Ninth Circuit in this case. However, the crucial difference is that the *Semke* Court found ample evidence that the manufacturer had refused to supply the dealer with automobiles unless it ordered unwanted models and that the manufacturer had refused to honor legitimate warranty claims. 384 F.2d at 196-198. In the present case, the opinion below does not hold that the refusal of a manufacturer to honor legitimate warranty claims or to supply automobiles unless unwanted models are also ordered cannot support a violation of the Act. The Court below simply follows the same standards that are used by the *Semke* Court but concludes that there is no evidence to support the jury's finding of a violation of the Act. This hardly qualifies as a conflict of decision meriting review by this Court.

Similarly, in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corporation,* 447 F.2d 786 (5th Cir. 1971), the Fifth Circuit concluded that there was sufficient evidence to support a judgment entered against an automobile manufacturer; the Court found enough proof that the manufacturer's conduct was coercive to justify the award of damages. 447 F.2d at 792-794. Again, the Court below does not rule that Saab conducted itself as did the manufacturer in *York* but still was not subject to liability.

Autohaus next asks this Court to review the evidence anew and compare it to the "closely analogous fact situation" in *Shor-Line Rambler, Inc. v. American Motors Sales Corp.,* 543 F.2d 601 (7th Cir. 1976). Petition, pp. 34-36. Even assuming that the comparison of 1,896 pages of transcript with the six page opinion in *Shor-Line* is valid, Autohaus in the next breath concedes that the existence of coercion or intimidation depends on the circumstances arising in each particular case. Petition, pp. 33-34. What this assumes is that the "facts" in this case are adequately established. They are not.

II. There Is No Important Question of Federal Law

Autohaus implies that since this Court has not reviewed a case arising under the Act, that fact standing alone makes

this case worthy of review. Petition, p. 32. What Autohaus fails to state is why every federal statute merits review by this Court. The Act was promulgated in 1956. Since that time, a well developed body of case law, including the decision below, has provided clear-cut lines of statutory construction and application. This case does not present any deviations from the established statutory norms. Moreover, the Court below relied upon this body of case law in formulating its decision. 567 F.2d at 910-914. This application of well established law to a given set of facts (more accurately an absence of facts) does not amount to an important question of federal law.

III. The Decision Below Is Clearly Correct

In the 26 page long "Statement" section of its Petition, Autohaus intertwines argument and selective characterizations of the record below in an attempt to discredit the decision below. Tunnel vision coupled with overzealous advocacy notwithstanding, the simple fact remains that the Court below "searched the entire 1,896 pages of transcript" in its review of this case. 567 F.2d at 907. It was only after this exhaustive review of the entire record that the Court below reluctantly set aside the jury verdict. *Id.* at 915. At this time in its Brief in Opposition, Saab deems it unnecessary to address each and every argument advanced by Autohaus. However, a review of Autohaus's contentions of error below discloses that each and every argument has been squarely met and refuted in the opinion rendered below.

IV. Valid Alternative and Independent Grounds Exist to Sustain the Decision Below

The Court below not only found that the evidence was wholly insufficient to support the finding of liability, it also stated:

> We would also reverse on the grounds that the evidence is wholly insufficient to support the award of $200,000 in damages. However, since we find no liability, we need not discuss this issue [567 F.2d at 904, fn. 1].

Thus, even if the decision below conflicts with that of another circuit court on an important federal question, a finding by this Court that Saab was in violation of the Act would solve nothing since Autohaus failed to prove its damages.

The opinion below also states:

> We note in passing that the trial court erred when it left the interpretation of the franchise contract up to the jury. The interpretation of a written contract is a question of law for the court to determine. *See* 4 Williston on Contracts § 616, p. 649, et seq. [567 F.2d at 915, fn. 10].

The Court below found that as a matter of law the franchise contract did not continue in effect past September 30, 1972. Autohaus had contended that the franchise contract continued in effect past that date and that Saab's "termination" of the Autohaus dealership on December 20, 1972, constituted a breach of the franchise agreement. Thus, the jury was free to conclude that the franchise contract was still in effect and that Saab had breached it. This was plain error since as found by the Court below, the franchise contract terminated on September 30, 1972. 567 F.2d at 914-915.

V. The Issue Presented Is Well Settled Under Existing Law

Despite Autohaus's contentions to the contrary, the issue before this Court is not whether Saab's proven conduct was a violation of the Act, but rather whether the

Court below utilized the correct standards of appellate review in reversing the jury verdict. The decision below clearly followed settled law when it explicitly set forth the applicable principles in a section entitled "Standard of Review." 567 F.2d at 909-910. What Autohaus fails to keep firmly in mind is the fact that the Court below simply found no evidence of any statutory violations. This is quite different from finding that Saab engaged in a coercive and intimidating course of conduct and yet was still not subject to liability under the Act.

VI. The Court of Appeals Has Already Reviewed the 1,896 Pages of Transcript

As evidenced by Autohaus's 26 page "Statement" section in its Petition, it is asking this Court to undertake an analysis of the particular facts involved in this case. Such a review of the evidence and discussion of specific facts is not the function of this Court and certiorari should be denied. This case contains no important issues nor does it conflict with any decisions. The voluminous transcript has already been reviewed and the task need not be repeated.

VII. Autohaus Did Not Raise the Jury Trial Issue Below

Autohaus makes a last ditch attempt at interjecting a Seventh Amendment issue into this case. However, Autohaus did not urge or brief this issue below and should not be permitted to now raise it for the first time.

Moreover, even if Autohaus's argument were timely it would still not justify a hearing in the present case. As pithily noted by Justice Holmes, the Supreme Court does ". . . not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227

(1925). To be sure, there are exceptions to this general rule, but the present case does not fall within any of those exceptions.

For example, the two decisions (*Tennant v. Peoria & P.U. Railway Co.,* 321 U.S. 29 (1944) and *Lavender v. Kurn,* 327 U.S. 645 (1946)) cited by Autohaus (Petition, pp. 36-37) are part of a group of cases in which this Court granted hearings because of the hostile reception accorded the Federal Employers' Liability Act by the lower courts, a hostility that had resulted in "a great maze of restrictive interpretations [being] engrafted on the Act, constructions that deprived the beneficiaries of many of the intended benefits of the legislation" and in "doubtful questions of fact [being] taken from the jury and resolved by the courts in favor of the employer." *Wilkerson v. McCarthy,* 336 U.S. 53, 69 (and Appendix at 71-73) (1949) (Douglas, J., concurring).

There is no suggestion that the Act at issue in the present case has been the subject of judicial hostility or that it has been systematically eviscerated so as to deprive its intended beneficiaries of their intended benefits.

Likewise, there is no claim that in the present case the Court below considered the case not to be of the *type* which should be decided by a jury. *Cf. Simler v. Conner,* 372 U.S. 221 (1963); *Beacon Theatres v. Westover,* 359 U.S. 500 (1959). And there is no claim that resolution of any of the factual issues in the present case will be determinative of any constitutional issues. *Cf. Berenyi v. Immigration Service,* 385 U.S. 630, 661 (1967).

The present case involves nothing more than a request that this Court reexamine the same facts that the Court below found, for multiple reasons, "to be wholly insufficient

to support either a breach of contract claim or a violation of the Dealers Day in Court Act . . . ." 567 F.2d at 904.

Autohaus has shown no reason why it has any more right to a hearing by this Court than does any other plaintiff whose temporary possession of a "legally unjustified windfall" was rectified by an appellate court.

VIII. Autohaus Did Not Ask for a Rehearing or Rehearing en Banc Below

Rule 40 of the Federal Rules of Appellate Procedure allowed Autohaus to petition for a rehearing before the Ninth Circuit division that heard the case below and to raise "with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." As noted in *National Labor Relations Brd. v. Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir. 1953), "[t]he purpose of a petition for rehearing, under the Rules of this Court, is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." If Autohaus really believes that the Court below committed such garden variety errors as wholly ignoring the testimony of Autohaus's president (Petition, p. 10) or resolving conflicting testimony (*Id.* at 11) or failing to give credence to permissible inferences (*Id.* at 13), Autohaus should have given the Court below (which was thoroughly familiar with the record) an opportunity to rectify these mistakes before asking this Court to duplicate that effort.

Similarly, if Autohaus really believed that the decision of the panel that decided this case in the Court below was in "Substantial Conflict With The Decision of Other Circuit Courts and With Congressional Intent" (Petition, p. 32),

Autohaus could have sought a rehearing en banc, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, as "necessary to secure or maintain uniformity of its decisions" or urged that this "proceeding involves a question of exceptional importance." *See also United States v. Williams*, 447 F.2d 1285, 1287 (5th Cir. 1971). Autohaus did neither (and offers no explanation for its failure), but now argues that these very grounds exist as reasons for this Court to grant certiorari. Autohaus's leapfrogging of these avenues of redress should not be rewarded by the granting of a hearing in this Court.

IX. The Questions Presented Do Not Affect the Public Interest

This litigation presents no issues of public interest sufficient to elevate it to the status of a case worthy of decision by this Court. The only interests involved are those of the respective litigants.

CONCLUSION

It is difficult to conceive of a poorer candidate than the present case for review by this Court. This case poses no new or novel issues of federal law, breaks no new ground, has minimal precedential value, and is not in conflict with any decision from any other circuit. The only issue in the case is whether Autohaus presented sufficient evidence to warrant submission of its case to the jury. The Court below, after an exhaustive review of the record below, found that Autohaus had not done so. If Autohaus had some quarrel with the manner in which the Court below performed its analysis or with the results reached, it could—and should—have raised its objections via a petition for rehearing, and if Autohaus truely believed the approach taken by the

Court below was in conflict with that followed by other circuits, it could—and should—have raised its claims via a petition for rehearing en banc. Autohaus elected not to pursue either of these remedies, and has instead attempted to conjure up "grounds" justifying review of the case by this Court. Examination of these "grounds" reveals that the case is no more entitled to review by this Court than it was entitled to submission to the jury in the District Court.

For the foregoing reasons, Saab respectfully submits that Autohaus's Petition for a Writ of Certiorari should be denied.

DATED: May 15, 1978.

Respectfully submitted,

RAOUL D. KENNEDY
NED N. ISOKAWA
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

WILLIAM T. RINTALA
KAPLAN, LIVINGSTON, GOODWIN,
BERKOWITZ & SELVIN

WILLIAM J. DOYLE
WIGGIN & DANA

Attorneys for Respondents